LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

August 17, 2012

Via Express Mail and Electronic Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416 West
Washington, DC 20004
hq.foia@epa.gov

Re: Proposed Rules, Summer/Fall 2012

To Whom It May Concern:

This is a Freedom of Information Act Request pursuant to 5 U.S.C. Section 552 *et seq.* relating to published reports that the Environmental Protection Agency ("EPA") is intentionally delaying the issuance of controversial new regulations until after the November elections. Reports also indicate that the Obama Administration "is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging." (Exhibit A, "EPA Positioned To Stay Under Radar Through 2012 Election Season," InsideEPA.com, July 17, 012, available at http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-17-2012/menu-id-565.html) The charges have come from multiple sources and suggest several troubling possibilities: the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare.

For example, the Bozeman Daily Chronicle reports that "a growing number of regulations are being delayed at federal agencies or at the White House" including EPA regulations. (Exhibit B, "As the Election Nears, New Regs Facing Delays," Bozeman Daily Chronicle, July 31, 2012, p. A4.) Politico.com reports that, "Even some Democrats say the White House has responded to political reality in slowing down environmental regulations." In fact, more EPA-generated rules were held up in the review stage of the White House's Office of Information and Regulatory Affairs (OIRA) than any other department or agency. (Exhibit C, Jonathan Allen and Erica Martinson,"EPA Wears the Bulls-Eye," Politico.com, June 20, 2012, available at http://www.politico.com/news/stories/0612/77626.html) Politico.com also writes that "Some say [Obama] truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give Romney any more ammunition before the election - and then open the floodgates after the polls close." (Exhibit D, Darren Samuelsohn

and Jonathan Allen, "President Obama's Administration Slow-walks New Rules, Politico.com, July 12, 2012, available at http://www.politico.com/news/stories/0712/78419.html)

Accordingly, this FOIA request seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and the date of this request.

Given the timeliness of this matter and the public interest in the unprecedented privacy concerns raised, Landmark Legal Foundation ("Landmark") respectfully requests that this records request be given expedited processing. Moreover, as Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Landmark seeks disclosure of the following records[1] **from January 1, 2012 to August 17, 2012** relating to:

1. Any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, "communications of any kind" does not include public comments or other records available on the rulemaking docket.

2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

II. Fee Waiver and Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Environmental Protection Agency ("EPA") regulations state:

> Records responsive to a request will be furnished without charge or at a charge reduced below that established under [40 CFR 2.107(c)] when a FOI Office determines, based on all available information, that disclosure of the requested

[1] The term "records" as used herein includes all records or communications preserved in electronic, written, or printed form, included but not limited to correspondence, documents, data, photographs, video recordings in any format, audio recordings in any format, faxes, files, guidance, guidelines, evaluations, instructions, analyses, technical manuals, technical specifications, training manuals, or studies.

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 40 CFR 2.107(l)(1) (2011).

EPA regulations further provide that four factors will be considered when determining whether a requester has satisfied the first requirement, i.e., whether the FOIA production is in the public interest.

(i) Whether the subject of the requested records concerns "the operations or activities of the government";

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information wil' contribute to "public understanding."

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 40 CFR 2.107(l)(2)(i)-(iv) (2011).

EPA regulations further dictate that the Agency employ the following factors when determining whether a requester has satisfied the second requirement, i.e., whether the FOIA production is or is not in the requester's commercial interest.

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure;

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, which disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Landmark satisfies each of these factors.

1. Release of Requested Records is in the Public Interest.

The FOIA requires the Agency to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498

(D.D.C. 1997). Further, "the amended statute 'is to be liberally construed in favor of waivers for noncommercial requesters.'" McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy went on to explain that the 1986 amendment's purpose was "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA." 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the EPA has set forth four factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concerns "the operation or activities of the government."

Landmark seeks EPA records related to the EPA's communications with external groups and individuals, including executive branch officials, over proposed rules or regulations. Proposing rules and regulations and the process leading up to such proposals are government activities. Clearly, the requested information concerns the operations or activities of the government.

b. Whether the disclosure is "likely to contribute to an understanding of government operation or activities."

The disclosure of the EPA records sought will contribute to the public's knowledge of EPA's regulatory process. Although comments are sought from the public about new regulations, not all communications relating to the process are readily available to the public. The release of records showing communications between the EPA and outside groups and individuals, including executive branch officials, would help shed light on government activities that aren't conducted in public view. This would undoubtedly contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to "public understanding."

The disclosure of the requested information will contribute to the public understanding of the EPA operations as a result of Landmark's long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the "public understanding" of the EPA's conduct and operations:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;

3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;

4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;

5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;

6. Landmark will issue press releases to specific media outlets; and

7. Landmark staff will appear on television and radio programs.[2]

Landmark has a proven record of ensuring that information it receives pursuant to FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

d. Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The disclosure of EPA information, including documents, electronic mail, audits, reviews and reports, will contribute significantly to the public understanding of government operations or activities. The possibility that individuals within the EPA consider political ramifications during the rulemaking process and alter their schedule according to the electoral calendar would significantly contribute to the public understanding of government operations or activities. Indeed, if individuals within the EPA discuss these considerations with outside groups or receive instructions to alter their regulatory timetable, the general public would have great interest in such information and would have a significantly greater understanding of the EPA's true activities. Disclosure could demonstrate that the EPA is attempting to shield its true policy intentions from public view during the election season- the time when many Americans are most focused on policy issues such as environmental regulation. Disclosure of such records will allow Landmark to determine if the EPA seeks to protect the public wellbeing first and foremost.

Landmark clearly satisfies each of these four factors. Consequently, disclosure of the requested materials is in the public interest.

[2] See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

In order for a fee waiver to be granted, the disclosure of the requested material must not be in the commercial interest of the requester. The EPA sets forth a two-part test in determining whether the requester has a commercial interest in the records release: (1) The Agency determines whether the requester has a commercial interest that would be furthered by the requested disclosure; (2) If the Agency determines the requester has a commercial interest, the Agency will engage in a balancing test to determine whether the identified commercial interest outweighs the public interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Thus, in order to trigger the second part of the commercial interest test, a requester must have a commercial interest in the records release.

Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information is consistent with Landmark's mission to educate the public concerning the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest non-profit organization. Since Landmark satisfies the first part of the commercial interest test, the balancing of the requester's commercial interest against the identified public interest is inapplicable.

B. Landmark's Request Should Receive Expedited Processing.

In order to receive expedited process, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011).

1. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is

intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections. In short, Landmark meets the factors for a compelling need.

2. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times, Wall Street Journal,* and many other national publications. Landmark's work is often discussed on national radio talk shows including *The Rush Limbaugh Show*, and *The Sean Hannity Show*. Landmark's president is a nationally syndicated talk show host, and while not in any way affiliated with Landmark, the Foundation's activities are regularly discussed on the program, which is heard by millions of Americans throughout the country. Landmark's only purpose in seeking this information, furthermore, is to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the general public and does not accept any government funds. Accordingly, Landmark must disseminate information about its activities to the general public in order to function.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that he group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

As noted on Landmark's website, "Among Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark fully expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

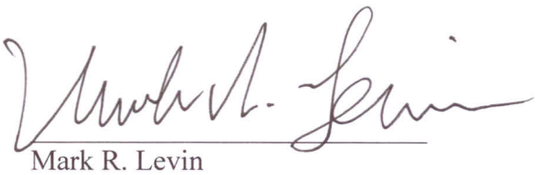
Please also note, while Landmark realizes that the EPA considers requests for fee waivers and expedited processing on a case-by-case basis, the EPA has granted Landmark's requests in the past. Moreover, Landmark has successfully litigated the issue of whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the EPA grant Landmark's fee waiver and grant its request for expedited consideration. You may contact Matthew Forys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.



Mark R. Levin
President
Landmark Legal Foundation

Exhibit A

INSIDEEPA.COM
an online news service from the publishers of Inside EPA

Insider Special -- July 17, 2012

Insider Special -- The Unfinished Agenda

EPA Positioned To Stay Under Radar Through 2012 Election Season

Posted: July 17, 2012

Editor's Note: You can read all the background stories and documents referenced in this special report by signing up for a free, one-month trial to InsideEPA.com (see box on this page).

EPA and its regulations have long-been a favorite target of critics but the agency is positioning itself to largely fly under the political radar through the elections.

The agency completed most of its controversial rules months ago, and is now killing some and delaying many others until November or later, while preparing to release relatively popular, non-controversial items such as its vehicle greenhouse gas (GHG) rule before the elections.

"I think we all understand that there are political windows that are better and others that are worse," says one environmentalist.

A former Bush administration official says EPA intentionally sought to establish deadlines for controversial measures that would fall after the election "no matter what." And it has put many discretionary items "on the slow track."

In an early indication of the administration's pre-election priorities, a top EPA transport official said recently that completion of the vehicle GHG rule, which is expected to cut gasoline consumption, is a "top priority," while a pending Tier III fuel and engine rule, which many critics said would raise gasoline prices, would be delayed.

The former Bush official says the Tier III standard -- which had drawn charges that EPA was seeking to further raise gasoline prices when they briefly spiraled upward this spring -- "was an easy one to delay," especially because the agency can synchronize it with its vehicle GHG rules that are years away from taking effect.

Most recently, EPA officials July 13 announced they had dropped a controversial rulemaking that would have required livestock operators to report a host of data to the agency under the Clean Water Act -- an issue that was riling many producers in Iowa, a key election battleground, and other important farm states. And EPA July 16 said it had renegotiated a legal deadline for a controversial stormwater control measure, from 2012 until 2014.

As a result of such efforts, EPA faces no legal mandates to issue major rules between now and the elections, with several deadlines pegged for December, such as for a pending final fine particulate matter air quality standard and a final Portland cement rule package.

The agency is also expected not to finalize until after the election its proposal setting a first-time greenhouse gas (GHG) new source performance standard (NSPS) for new power plants despite winning a sweeping June 26 ruling from the U.S. Court of Appeals for the District of Columbia Circuit broadly backing its GHG regulatory program. EPA maintains it has "no plans" to issue GHG standards for existing sources but could do so late this year, several sources say.

Also likely delayed until after the election: a proposed guidance for permitting hydraulic fracturing operations that use diesel fuel, final cooling water standards for power plants, "uniform" air toxics standards for chemical and other industrial plants, guidance for determining when isolated wetlands and other marginal waters are subject to regulation under the water law, the "Tier III" fuel and engine standards, and a long-delayed rule setting standards for disposal of coal ash.

One industry source notes that the administration was able to delay the fracking permitting guidance and the "uniform" air toxics standards by extending the comment deadline -- a clear indication that the measures will not go final anytime soon. "The administration is not interested in any new rules that they don't have to do between now and the election," the source says.

Additionally, because EPA's final NSPS for the oil and gas sector has not yet been published in the *Federal Register* months after it was signed, any challenges to that rule will be delayed.

Political Messaging

But the administration is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging. Key among them is the GHG vehicle rules for model years (MY) 2017-2025, which EPA delivered to the White House for review July 16, in time for its release in the midst of election season.

The rule, which has widespread support including from most automakers, will likely allow the administration to make a host of key arguments, including highlighting its efforts to curtail GHG emissions, improving fuel efficiency and demonstrating the potential economic benefits of environmental regulations -- the latter of which would likely play well in Michigan, Ohio and other auto manufacturing states that are also key swing states.

Similarly, the administration is likely to issue its revised package of air and waste rules regulating incinerators and boilers that will weaken an earlier final rule to address industry criticism.

While they were not able to win broader industry support, the Obama re-election campaign is nevertheless highlighting EPA's controversial power plant air toxics rule, alongside the vehicle GHG rules. "The new [power plant] rules will help to clear our skies of pollutants that can make health problems like asthma and bronchitis worse, saving up to 17,000 lives per year," the campaign website says.

The former Bush official says that "if something is not done now, it's pretty well going to slide" until after the election, adding that "absolutely the last point in time" a rule would be signed is mid-September to avoid chances of a new administration immediately overturning it. "The most conservative thinking says don't even bother because if the administration flips [the new administration] will go back and take a look at what you did anyway. Or if it doesn't flip then you can put it out at the end of the year."

The source adds that EPA is also "in a pretty good place" with its Cross State Air Pollution Rule (CSAPR), which has been challenged in the D.C. Circuit and where a ruling is expected imminently. "If the court comes out tomorrow morning and [remands or vacates it], there is probably a space where they say they are evaluating the court opinion" and do not take any new action for months. If EPA wins, then it is another legal victory for the agency.

EPA air chief Gina McCarthy said at a July 10 forum that the agency would push back compliance deadlines if the agency prevails in the challenge, saying the agency would be "very sensitive" to state and utility needs for more time.

A second industry source notes that the Obama administration started with a number of controversial items "dumped in its lap early on, some of which it took on willingly and some the product of deadline litigation, particularly in the case of the Clean Air Act. . . . They coupled must-dos with want-to-dos to make for a very busy first term, particularly the first three years. What's happened now in 2012 is a combination of presidential election reticence as well as some of these obligations drying up. . . . It is a slightly odd confluence of events."

The environmentalist agrees that not much is going to move before the election but vows to continue to press the agency to act on important measures.

While EPA is "certainly not shut down for the rest of the term," the source says, "it's very likely that none of this stuff gets done before the election." Still, the source says it is possible some stalled items could move. "The obvious question for them is do they think it is either something no one is really going to pay attention to or something industry wants done, which could be the case with the boiler air toxics standards because it weakens them."

House Hits

Despite the agency's attempts to slow down rulemakings, sources across the political spectrum expect House Republicans to continue placing EPA in their crosshairs.

Lawmakers continue an almost daily messaging of press releases, hearings, letters and other actions highlighting agency measures and their effects. The GOP leadership has named the week of July 23 "Red Tape Week," where they intend to highlight the effects of EPA and other agency regulations and vote on a series of measures to strengthen the regulatory review process.

Similarly, Rep. Ed Whitfield (R-KY) has slated a series of forums on amendments to the Clean Air Act starting with a focus on the law's state implementation plan provisions late this month.

The environmentalist expects "pretty much more of the same" from the House "including overreach on everything" that will mostly be "political and for show."

A Democratic strategist notes those efforts will "not go anywhere in the Senate. The House is going to try and force the construction of the Keystone XL pipeline . . . but that is also not going to happen. Between now and the election there will be much heat but little light shed on energy issues."

The former Bush official says the transportation bill enacted into law this summer was "the last" legislative vehicle for environmental policy riders that could have moved before the election, but EPA critics fared poorly there -- failing to attach a controversial measure blocking EPA's pending coal ash rules. "I don't know of anything that was more likely to get through than [the coal ash measure] and it didn't, and it's hard to imagine anything else significant," says the first industry source.

The source notes that lawmakers are not even planning to move any appropriations measures before November.

Efforts likely to go nowhere include GOP bids to revoke EPA's GHG authority, nascent lame-duck efforts to impose a carbon tax and efforts to pass tax extenders for a range of energy credits such as biofuels and renewables, though several sources are holding out hope that the energy credits could be included in end-of-year "fiscal cliff" efforts.

A second environmentalist adds that long-sought reforms to the Toxic Substances Control Act (TSCA) still appear doomed despite a recent victory from longtime TCSA reform supporter Sen. Frank Lautenberg (D-NJ) in attracting GOP support.

EPA And The Election

Sources agree that EPA will not have a top-tier role in the presidential election between Obama and GOP challenger Mitt Romney, though the Democratic strategist expects Democrats to hint at agency stances when they talk about "protecting public health and protecting clean energy jobs of the future." The source adds Obama will continue to talk about his pro-environmental record of saving lives, spurring innovation and creating jobs.

The second environmentalist says activists are disappointed that Obama is not running more on his environmental record and "excoriating" Romney for his flip-flopping on climate change. Because of Romney's change in position, he is also not expected to bring the issue up much. "Obama has made a fundamental mistake on these issues and has tried not to popularize them, which he could have done," the source says.

But sources say that regardless of the election's outcome, there is likely to be a flurry of rules and other policies being issued after Nov. 8 -- including measures that are subject to legal deadlines, or, in the event President Obama loses his re-election bid, to leave traps for the administration of GOP challenger Mitt Romney.

"If there is no second term, I would expect EPA to finalize a bunch of rules that are not final," the first environmentalist says, adding EPA will also propose discretionary rules as well for the Romney administration to finalize or kill.

The second industry source also expects a flurry of November and December activity from EPA if Obama loses, with the hope of some of them becoming permanent, while a more tempered pace if he wins.

But a third industry source would expect a lame-duck EPA to "not try to put things through if [Obama] loses because they can be undone." -- *Dawn Reeves*

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Defense Environment Alert
Environmental Policy Alert

Budget
Litigation
Toxics
Natural Gas
Election 2012

Federal Facilities Watch
Outlook 2012

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Exhibit B



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Bozeman Daily Chronicle

July 31, 2012 Tuesday

SECTION: NATION; Pg. A.4

ACC-NO: 116114

LENGTH: 407 words

HEADLINE: As the election nears, new regs facing delays

BODY:

WASHINGTON (AP) -- When the Obama administration agreed to set the first-ever federal limits on runoff in Florida, environmental groups were pleased. They thought the state's waters would finally get a break from a nutrient overdose that spawns algae, suffocates rivers, lakes and streams and forms byproducts in drinking water that could make people sick.

Nearly three years later -- with a presidential election looming and Florida expected to play a critical role in the outcome -- those groups are still waiting. The rules, originally scheduled to take effect in March, now won't be active until next January, and even then could be replaced altogether by state-drafted regulations.

In fact, a growing number of regulations are being delayed at federal agencies or at the White House. The list includes a rule cracking down on junk food at school bake sales, another banning children from dangerous work on farms and one setting federal standards for disposing toxic ash from coal-fired power plants.

Together, the delays suggest caution by the administration at a time when President Barack Obama is increasingly under attack by Republicans and business groups for pushing regulations that they say will kill jobs or needlessly extend federal power.

"Issuing more regulations now would not help dispel the perception that President Obama's administration is 'anti-business,'" said John D. Graham, who from 2001 to 2006 headed the Office of Information and Regulatory Affairs, the White House's political gatekeeper for new rules. And with unemployment at 8 percent, "the Obama administration knows that more costly burdens on business will not create jobs. Those rules will have to wait until after the election."

It's not uncommon for rulemaking to slow during election years "because the White House does not want to create any controversy," Graham, now dean of Indiana University's School of Public and Environmental Affairs, wrote in an email to The Associated Press.

Just last week, the EPA announced it would wait until 2013 to issue a regulation aimed at reducing the number of juvenile fish and shellfish that die in power plants' cooling water intakes and would also tweak a rule requiring new power plants to control mercury and other toxic air pollution. Republicans and industry had charged that both rules would help "kill" coal as an electricity source by helping to shut down older plants and preventing new ones from being built.

LOAD-DATE: August 1, 2012

Exhibit C

OBAMA'S LAST STAND
The latest eBook by POLITICO's GLENN

POLITICO

EPA wears the bull's-eye

By: Jonathan Allen and Erica Martinson
June 20, 2012 09:21 AM EDT

This election year the EPA is toxic.

The Senate is voting on whether EPA planes can take pictures of farms — after it was mistakenly reported that drones were flying over the heartland. House Republicans want to cut the agency's funding to pre-1998 levels. And the president has threatened to veto a House bill, due up Wednesday, that would restrict Clean Air Act rules.

(Also on POLITICO: Energy issues crop up with farm bill)

Oh, and there were at least 10 — count 'em 10 — Capitol Hill hearings and markups on environmental matters Tuesday.

Forget drones, EPA could use a missile shield.

This week is just the latest round of a Republican attack that has forced the White House to hold back on new environmental regulations, lawmakers say — at least for now.

"They have slowed down some of that stuff, but it's only until after the election," Rep. Mike Simpson (R-Idaho) said. "After that, it's going to be scary."

Even some Democrats say the White House has responded to political reality in slowing down environmental regulations.

"The unrelenting attacks by the Republicans on environmental protection, I think, have caused people in the administration to be careful to pick their fights," said California Rep. Henry Waxman, the top Democrat on the House Energy and Commerce Committee.

To Republicans, the agency is the very embodiment of what they see as the worst of President Barack Obama and, as they see it, his liberal policies: big government reaching into the minutia of businesses.

And the drone rumor follows a list of other strange accusations plaguing the agency this year, like talk that it would start regulating farm dust (which it had no plans to do) and spilled milk (a trumped up version of reality).

"They are just an intimidating, overreaching, regulatory body," Rep. Nick Rahall (D-W.Va.) said of EPA. Rahall's state recently held a symposium on EPA's "War on Coal," a response to regulations now in effect and in the pipeline that could damage the coal industry.

Mitt Romney has hammered Obama over EPA policies during campaign stops in coal

country. For his part, Obama has warned that a Romney administration would roll back existing regulations to the detriment of public health, and his campaign has pointed to instances of Romney reversing past support for environmental regulations.

"It's not that people don't care in Missouri about the environment and it's not that they don't want some basic rules to make sure we have clean air and water," Sen. Claire McCaskill (D-Mo.) told POLITICO. "It's they don't want the overreach. And I think that's been a political talking point on the other side that has taken root particularly in the rural part of the state."

There are currently 25 EPA-generated rules held up in the review stage of the White House's Office of Information and Regulatory Affairs, more than any other Cabinet department or agency, according to the Office of Management and Budget. HHS, charged with implementing the president's health care law, has just 17 in that pipeline.

The full list of EPA rules in various stages of regulatory purgatory is much longer. They include mandates on coal ash, gasoline sulfur standards, Clean Water Act jurisdiction and industrial boilers. Gina McCarthy, the EPA's air chief, said Tuesday she doesn't know when the new boiler rule will be finalized.

"Still working on it," she told POLITICO. "Still working on it."

Last week, EPA sent a letter saying it isn't prepared to regulate greenhouse gas emissions from planes, and that it won't do so for engines on ships and other off-road vehicles and machines.

Some environmental groups say the agency should fight harder.

"The best defense against political attacks on the Clean Air Act is ambitious implementation of all its successful clean air programs, because they save lives and protect the climate. But when the EPA drags its heels on clean air implementation, big polluters and their lobbyists just sense weakness and redouble their attacks," said Kassie Siegel, the director of the Climate Law Institute at the Center for Biological Diversity.

But the stalled regulations don't tell the whole story. The Obama administration has finalized several significant environmental regulations — most under court orders — that have provided fodder for congressional cannons. They include greenhouse gas limits for new power plants, the mercury and air toxics rule at existing power plants, requirements to cut methane emissions at hydraulically fractured natural gas drilling sites, and a heavy hand overseeing mountaintop mining.

Sen. Lamar Alexander (R-Tenn.) is one of the few Republicans to embrace environmental regulations. He is a fan of a rule requiring costly power plant upgrades that would stop mecury and other toxins from getting into the air, and one that tries to protect downwind states from other states' pollution.

"That's what should have been done years ago. These pollutants were identified in the law in 1990, and 20 years later we're just getting around to doing what the courts have ordered EPA to do," Alexander said.

But for most Republicans and some Democrats the politics are clear: It's best to kick the EPA when it's down. Some are trying to block regulations that the administration is no longer pursuing.

McCaskill and Sen. Mike Johanns (R-Neb.) offered an amendment to the farm bill that would have stopped the EPA from implementing a farm dust rule that had been abandoned. (That amendment didn't make it onto the final list of 73 amendments being debated on the floor this week.) And McCaskill is proud of her efforts to block a child labor regulation from the Labor Department.

"I want to make sure no one forgets I had a part in killing both of them," she said.

For many environmental protection advocates, the battle is a partisan one. The Republicans who defended the EPA in the 1980s and 1990s are now gone. Waxman and Rep. Ed Markey (D-Mass.) published a report on Monday listing 247 votes the Republican-led House has taken since January of 2011 that they say would hurt environmental or public health policy.

And some on the left note that the House Republicans haven't really won many battles.

"The toxic cloud of anti-EPA rhetoric from congressional Republicans has had limited effect because the Senate and the president have kept most of their nasty little bills to gut our health and environmental protections from becoming law," David D. Doniger of the Natural Resources Defense Council said. "All this anti-EPA venom appeals to their base, but it is out of step with the majority of the American people, who consistently say they want EPA to do its job and they want Congress to keep its hands off the laws that protect our health and our environment."

But Republicans made clear late Tuesday that they have no intention of giving even an inch to the EPA. House Energy and Commerce Chairman Fred Upton (R-Mich.) and several members of his committee sent a letter to EPA and the White House suggesting that the federal government is overreaching in its research and regulation of hydraulic fracturing, also known as "fracking."

Sen. Jim Inhofe (R-Okla.), who is forcing a Wednesday vote on repealing the EPA's rule limiting mercury and other air pollutants from power plants, sent a letter to the agency's inspector general asking for an investigation into a controversial natural-gas enforcement case in Texas.

And the White House is fighting back against congressional Republicans. OMB issued a veto threat Tuesday against a House energy bill that it says would block implementation of rules associated with the Clean Air Act.

Darren Goode contributed to this story.

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Exhibit D

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President Obama's administration slow-walks new rules

By: Darren Samuelsohn and Jonathan Allen
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It's a staple of Mitt Romney's talking points: President **Barack Obama** and his lefty lieutenants have stifled economic growth with a Politburo-style regulatory regime.

After all, the president dropped two of the biggest regulatory bombs in memory with the **Dodd-Frank Wall Street Reform** and a **health care law** that gives the Health and Human Services Department sweeping authority to run a whole new insurance system.

But now Obama's making it tougher to put costly new rules in place. His enforcer: **Cass Sunstein**, an old buddy from their University of Chicago days whose friendship with the president gives him more clout in the West Wing than many advisers of higher rank. Sunstein has imposed what is essentially a soft freeze on new regulations.

Even though that's not official policy, the administration has been increasingly frugal in issuing regulations, according to a POLITICO review of government data and more than two dozen interviews with current and former administration officials, lawmakers in both parties, business leaders and liberal activists. The analysis of the federal rule-making database shows Obama as of Tuesday had issued 1,004 final regulations since arriving in office. That's fewer than his two immediate predecessors, George W. Bush and Bill Clinton. This year, Obama is also on pace to put out the fewest "economically significant" regulations of any year in his presidency.

In classic Washington fashion, the administration's slowdown of new rules is making liberals mad and winning Obama no credit from Republicans or the business community — especially not in an election year in which the over-regulator meme is so prevalent.

Some say he truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give **Romney** any more ammunition before the election — and then open the floodgates after the polls close.

Either way, the result is the same.

Most agencies aren't even on the scoreboard with big-ticket rules this year: The Environmental Protection Agency: two major regulations, clamping down on emissions from petroleum refineries, and on oil-and-gas drilling operations. The Department of Justice: One, on prison rape. Treasury: One, on Dodd-Frank.

Republicans "just assert stuff and the facts have never encumbered them. I think there's a sense that Democrats are regulation-bound or regulation-minded and so the assertion sticks. I don't think it's any more complicated than that," said Harold Ickes, who served as deputy chief of staff to Clinton and then counted delegates for Hillary Clinton when she ran against Obama.

Romney has linked the administration's rule-making to his larger narrative about Obama's job-killing agenda.

In Michigan last month, the Republican led a call-and-response asking a crowd if it wanted "four more years of Obamacare," "four more years of Dodd-Frank" and "four more years of energy policies that say we can't use our oil and our coal and our gas."

And here's what he said in March in Illinois: "Day by day, job-killing regulation by job-killing regulation, bureaucrat by bureaucrat, this president is crushing the dream and the dreamers, and I will make sure that finally ends."

GOP-aligned groups are reinforcing the message.

American Crossroads is running an ad quoting Cecil Roberts, president of the United Mine Workers of America, discussing concerns about rules to limit coal pollution. "Our health care, pensions and way of life are on the line," a narrator warns. "Say no to the Obama administration's extreme EPA rules."

Clearly sensitive to the attacks, Obama has defended himself on the trail.

"I don't believe every regulation is smart, or every tax dollar can be spent wisely," Obama said at a campaign rally last month in Durham, N.H.

Facts can be tricky things, as evidenced by a House Energy and Commerce Committee news release issued last month June when EPA bowed to industry demands to soften a proposal regulating cement kilns — to the consternation of environmentalists.

In the same sentence, Rep. John Sullivan (R-Okla.) called the industry-friendly rule a "welcome development" while still denouncing the "EPA's radical regulatory agenda."

Experts on federal regulations say that rule-making often slows down in an election year but that it's particularly acute now because Republicans have focused so much attention on that element of the president's work.

"They're just incredibly afraid of the job-killing label," OMB Watch President Katherine McFate said.

Agency officials say the White House is so obsessed with depriving Republicans of fresh ammunition that Sunstein has moved beyond the traditional role of reviewing regulations to dip into minor matters that don't rise to his level as head of the Office of Information and Regulatory Affairs, such as guidance from the agencies to the states.

"They are asserting their review authority over lesser and lesser things," an EPA official said.

Regulations are a methodical and essential part of any administration's governing once the legislative sausage-making is complete. Agencies must follow strict administrative requirements to propose rules, accept public comment and then finalize their plans — all with the Office of Management and Budget keeping close tabs on the process.

Obama's regulatory policies have caused heartburn for agency officials and advocates who see months and years of work blocked by the White House internal review process.

Ideas stuck on the drawing board include an EPA plan to reduce mercury waste from dentist offices, an Occupational Safety and Health Administration update to protect workers from exposure to crystalline silica dust and Energy Department efficiency standards for walk-in freezers.

Sunstein said the number of economically significant regulations that come out in any given month or year depends on several factors — but not politics.

"The president has made clear his priority is getting out of a tough economic situation," Sunstein told POLITICO. "From the time I got here, my priority was to make sure our regulatory framework fit with economic priorities. If you have expensive rules, you want to make sure they are amply justified."

So far, the number of Obama's regulations trails those of his predecessors. After the midterms, Bill Daley entered the White House as chief of staff. He courted the U.S. Chamber of Commerce and promised to make the administration more business-friendly.

While the overall number of final Obama rules was slightly higher the year after the 2010 mid-terms, the number of economically significant rules — which have either a $100 million price tag or $100 million in public health benefits — dropped from 70 in 2010 to 55 last year, according to a search of the economically significant rules listed in the OMB database. This year, nearly a third of the big-ticket rules — eight of 25 — have been related to implementing the health care law.

The length of time regulations sat at OMB for review also has increased by more than three weeks since the 2010 elections, from an average of 45 days before to 67 days after.

And here's how Obama's 1,004 rules completed as of Tuesday compares overall with his predecessors: George W. Bush had completed 1,073 rules at the same point in office, Clinton 1,775, according to the OMB database. In September 1993, Clinton issued an executive order that narrowed the definition of a economically significant rule and the number of rules reviewed by the White House.

"Just the fact is we haven't had as many as our predecessor," Sunstein said. "That's suggestive that there's been some discipline."

Sunstein, once a target of conservative commentator Glenn Beck, has now become a lightning rod for agency officials and liberal activists. His office, which is part of the White House OMB, can make or break new regulations — and, more frustrating to some folks in the administration, tweak them just enough at the last minute to tip the balance more toward industry.

A hard-nosed number-cruncher known for halting regulations if he determines they would burden business more than they would benefit the public, Sunstein has the added gravitas of coming into his job in September 2009 as a friend of Obama's.

"I can talk to him if I need to," Sunstein said. "But he has a lot of things to do, so I want to work under his guidance without diverting him from other things like wars and averting a depression."

Sunstein's "strength in the administration appears to be increasing over time," said John Graham, George W. Bush's first regulatory chief and now dean of the Indiana University School of Public and Environmental Affairs. Graham noted that Sunstein has pushed

through a pair of regulatory reform initiatives that eliminate red tape at agencies and kill redundant rules, an effort that should help Obama improve his image with industry.

"The more visible OIRA becomes in regulatory reform, the more it will relieve the widespread concern that President Obama is anti-business," Graham said.

A former Obama administration official told POLITICO that Sunstein's influence also has grown since OMB Directors Peter Orszag and Jack Lew moved on, elevating Jeff Zients to the role of acting chief.

"Cass is in the enviable position of being very close to the president, and he is therefore able not only to read him well but also to reflect him well," said Sally Katzen, former Clinton regulatory chief and now senior adviser at the Podesta Group.

In the interview, Sunstein touted a range of rules that he said have gotten the government solid bang for its buck: roughly $91 billion in net public health benefits and consumer savings through the first three fiscal years of Obama's term. He cited new fuel economy regulations that will reduce the number of trips Americans need to make to the gas station and a salmonella rule that's preventing up to 79,000 illnesses a year. There have also been other efforts, including replacing the food pyramid with a graphic that displays food categories on a plate.

"If you've got a rule that prevents a serious harm to people who can't in some cases really protect themselves, that's good," Sunstein said.

Obama-era regulation implementation costs also have peaked at just more than $9 billion in a single year. "We didn't hit the [George W.] Bush high" of $10 billion, nor the highs during the prior three administrations — Clinton, George H.W. Bush and Ronald Reagan — which were all well over $10 billion, Sunstein said.

Speaking Friday in Pittsburgh, Obama went on offense on regulations, saying Romney plans to eliminate rules "that we just put in place to make sure that Wall Street doesn't act recklessly and we can prevent another taxpayer-funded bailout when the financial system goes out of whack; regulations that protect our air or our water; regulations that protect consumers from being taken advantage of."

Democratic lawmakers defend Obama's regulatory record.

"From the beginning, they've been trying to balance the equities there," said Rep. Chris Van Hollen (D-Md.). "My sense is that they work very hard to be reasonable both in protecting the public health and protecting consumers but doing it in the most cost-effective way."

While Republicans are not holding back in their criticism, most industry groups are far more restrained. Some acknowledge the numbers show a less aggressive government than the political rhetoric suggests. Others don't want to upset Obama for fear he'll unleash many more rules if he wins a second term.

"It's probably accurate to say the regulations, the economically significant regulations, have been fewer," said Bill Kovacs, a senior vice president of the U.S. Chamber of Commerce, who noted the Obama EPA hasn't exercised its full authority under the Clean Air Act in regulating power plants. So far, EPA has proposed rules only for new facilities and postponed until after the election a much more costly set of requirements on the

nation's aging electric utilities.

"The president has said, 'Hey, we've got to slow this down,'" said Rep. Lee Terry (R-Neb.). "We can't have more layoffs in October and November."

Rep. Mike Simpson, the Idaho Republican who is in charge of EPA's annual spending bill, predicted an Obama defeat would unleash a torrent of midnight regulations from Obama before Romney is sworn in.

And "if he is reelected," Simpson added, "it's hellbent for leather."

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